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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 308

LESTER G. MADDOX,
Appellant,

v.

GEORGE F. WILLIS, JR., ET AL.,
Appellees.

BRIEF OF APPELLANT OPPOSING MOTIONS OF APPELLEES TO DISMISS OR AFFIRM.

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PAGE

INDEX

	Page
Brief of Appellant opposing Motions to Dismiss or Affirm	1
Argument	1
A. On Motions to Affirm	1
B. On Motions to Dismiss	15

TABLE OF CASES

Adair v. United States, 208 U.S. 161	7
Bailey v. Alabama, 219 U.S. 219, 241	12, 13
Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28	3
Bute v. State of Illinois, 333 U.S. 640	10
Carew v. Rutherford, 106 Mass. 1, 14	5
Clyatt v. United States, (1905) 197 U.S. 207, 216	12, 14
Commonwealth v. Hunt, 4 Met. 11, 133	5
Corrigan v. Buckley, 271 U.S. 323, 330	12
Crews v. Lindquist, (1935) 361 Ill. 193, 197 N.E. 768, 772	12
District of Columbia v. John R. Thompson Co., 346 U.S. 100	3
Ex parte Milligan, 4 Wall. 2, 18	12
Federal Trade Commission v. Raymond Bros.—Clarke Co., 263 U.S. 565	5
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348	1, 2, 3
Heywood v. Tillson, 75 Main, 225	5
Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377	2, 4
Legal Tender Cases, 12 Wall. 457, 551 (1870)	6
Louisville & N. R.R. Co. v. West Coast Naval Stores Co., 198 U.S. 483	6
Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 199	12
Maxwell v. Dow, 176 U.S. 581	8
McMaster v. Ford Motor Co., 122 S.C. 244	5
Mexican Ore Co. v. Mexican Guadalupe Min. Co., 47 Fed. 351, 356, 357	5

Page

NAACP v. Alabama, 357 U.S. 449, 460 11
Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) 6
Phillips v. United States, 312 U.S. 246, 254 17
Producers' Transportation Co. v. R.R. Commission, 251 U.S. 228 6
Query v. United States, 316 U.S. 486, 491 17
Railway Mail Association v. Corsi, 326 U.S. 88 3
Slaughter-House Cases, 16 Wall. 36, 69 ..... 2, 7, 8
Stratton v. St. Louis Southwestern, 282 U.S. 10, at 16 16
United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) 6, 7
United States v. Colgate & Co., 250 U.S. 300 at 307 6
United States v. Cruikshank, 92 U.S. 542 ..... 8, 9
United States v. Harris, 106 U.S. 629 8
United States v. Wheeler, 254 U.S. 281 8
Winchester v. Howard, 97 Mass. 303, 305 5

STATUTES

Section 206 (b) of Title II of the Civil Rights Act of 1964, 78 Stat. 245, 42 U.S.C. 2000a-5 ..... 3, 4, 15, 16
Georgia Code, Section 52-103 2

Provisions of Constitution

Original Constitution
Article IV, Section 2, clause 1 ..... 2, 4, 7, 10
Amendments
First 2, 4, 11
Fifth 2, 3, 11
Ninth 2, 10
Tenth 2, 11
Thirteenth 2, 4, 12

TEXTS

12 Am. Jur. Contracts, Sec. 149, p. 641 7
Cooley on Torts, Vol. 2, 3d. Ed. 587 5
Fletcher Cyc. Corp. (Perm. Ed.) Vol 10, Injunctions, Ch. 53, Sec. 4875, p. 329 5

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ARGUMENT

A.

ON MOTIONS TO AFFIRM

All of the appellees have filed motions that the appeal be dismissed on the ground that it is not within the jurisdiction of this Court, or, in the alternative, that the final judgmen of civil contempt be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

Appellees contend that the decisions of this Court in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S.

241, 85 S. Ct. 348, and in *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, manifest that the claims by appellant that the final judgment of civil contempt against him, as sole proprietor of Lester Maddox Cafeteria, deprives him of rights guaranteed to him by the several provisions of the Constitution of the United States and Amendments thereto, specifically invoked as defenses in his responses to the orders to show cause, are so unsubstantial as not to need further argument. Appellant claims that rights secured to him by the First, Fifth, Ninth, Tenth and Thirteenth Articles of Amendments, and by Article IV, Section 2, clause 1 of the original Constitution are violated by the final judgment of civil contempt against him as sole proprietor of Lester Maddox Cafeteria. Appellant most clearly contends that his conduct did not violate the injunction of September 4, 1964.

In *Heart of Atlanta Motel, Inc. v. United States*, supra, no rights under the First Amendment and under Article IV, Section 2, clause 1 of the original Constitution were claimed by the corporation. The claim under the Thirteenth Amendment on behalf of the corporation was frivolous, since this Court long ago construed the term "involuntary servitude" therein to mean a personal servitude and to apply only to human beings. *Slaughter-House Cases*, 16 Wall. 36, 69. The corporation (Heart of Atlanta Motel, Inc.) dedicated its property to public use when it opened the motel, being bound by the laws of Georgia requiring an innkeeper "to receive as guests, so far as he can accommodate them, all persons of good character offering themselves, who are willing to comply with his rules." Ga. Code Section 52-103. It never had any right to refuse accommodations in the motel, if available, to any person of good

character who was willing to comply with its rules, and had no valid claim that Title II of the Civil Rights Act of 1964 deprived it of liberty or property in violation of the Fifth Amendment.

This Court, in *Heart of Atlanta Motel, Inc. v. United States, supra*, at page 359 of 85 S. Ct., stated:

> "... in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty."

In support of this statement this Court referred to *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, and cases there cited. The District of Columbia case involved a criminal prosecution against a corporation for discriminating against Negroes in operating a restaurant in the District of Columbia in violation of a local ordinance. No defense of personal liberty was involved. The two cases there cited are *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, and *Railway Mail Association v. Corsi*, 326 U.S. 88. In the first case cited, this Court merely upheld the conviction of a corporation, operating a public conveyance, under a Michigan Civil Rights Act prohibiting operators of public conveyances from discriminating against persons on account of race. In the second case cited, this Court merely upheld the New York Civil Rights Law prohibiting a labor union from denying membership in the union on racial grounds, as against the contention that the application of the law to the union of railway clerks was violative of the Due Process Clause of the Fourteenth Amendment. In none of these three cases did this Court reject a claim that the prohibition of racial discrimination in public accommodations inter-

feres with personal liberty. None of them involved an individual conducting a purely private business. After most diligent search we have been unable to locate any case decided by this Court wherein this Court has ever considered a claim by an individual owner of a private business that the prohibition of racial discrimination in the conduct of such business interfered with his personal liberty. Furthermore, we have been unable to find a single case where any State Civil Rights Act, requiring equal service to all persons in privately owned personal service businesses, has been decided to be, or not to be, in violation of the prohibition of involuntary servitude of human beings contained in the Thirteenth Amendment.

In *Katzenbach v. McClung*, supra, at page 380 of 85 S. Ct., this Court said:

> It was admitted that the Thirteenth Amendment was authority neither for validating nor invalidating the Act."

Appellant respectfully contends that the constitutional rights which he asserted and claimed as defenses in the court below under the First and Thirteenth Amendments, and under Article IV, Section 2, clause 1 of the original Constitution, have not heretofore been considered by this Court with respect to the application of Title II of the Civil Rights Act of 1964 to the owner of a purely private personal service business. These are substantial constitutional issues which warrant full argument upon appeal of the final judgment of civil contempt against appellant.

Appellant's conduct subsequent to September 4, 1964, was not a violation of the permanent injunction of that date, because appellant at all times thereafter

was acting in his own independent interest as owner of Lester Maddox Cafeteria, and not in the interest of nor for the benefit of The Pickrick Corporation, which had closed down the Pickrick Restaurant on August 13, 1964. See *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. 351, 356, 357; *Fletcher Cyc. Corp.* (Perm. Ed) Vol. 10, Injunctions, Ch. 53, Sec. 4875, p. 329.

A party not under contract with another has a right to refuse to enter into contractual relations with him, no matter what his motive for such refusal may be. "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. . . . He may refuse to deal with any man or class of men." *Carew v. Rutherford*, 106 Mass. 1, 14. *Commonwealth v. Hunt*, 4 Met. 11, 133. *Winchester v. Howard*, 97 Mass. 303, 305. *Heywood v. Tillson*, 75 Maine, 225. *McMaster v. Ford Motor Co.*, 122 S.C. 244. "It is the right, 'long-recognized,' of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to parties with whom he will deal'." *Federal Trade Commission v. Raymond Bros.-Clarke Co.*, 263 U.S. 565.

In the case last quoted from, this Court cited as authority for its holding 2 Cooley, Torts, 3d. Ed. 587, which reads:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern."

This Court reaffirmed this "long-established" civil right of the private trader, such as appellant, by its decision in the case of *United States v. Colgate & Co.*, 250 U.S. 300, at 307, and, further emphasizing the right, said:

> "And, of course, he may announce in advance the circumstances under which he will refuse to sell."

Only the owner of private property can dedicate it to public use, and unless he does so, the owner has the "right of sole occupancy, or power of regulation, thereof." *Louisville & N. R.R. Co. v. West Coast Naval Stores Co.*, 198 U.S. 483.

A State can not, by legislative fiat or regulatory order of a commission, convert a private trader's property into a public utility; "for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment." *Producers' Transportation Co. v. R.R. Commission*, 251 U.S. 228. Nor can Congress, by legislative fiat, convert appellant's private cafeteria to public use as a place of public accommodation, consistently with the same clause of the Fifth Amendment.

This Court's decisions in *Legal Tender Cases*, 12 Wall. 457, 551 (1870), *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), and *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), are inapposite and without precedential value in determining the constitutionality of Title II of the Civil Rights Act of 1964 as applied to appellant, and claimed to be a violation of appellant's rights under the Fifth Amendment. All of those cases involved the power of Congress to pass emergency measures during wartime

and deemed necessary to marshall the nation's resources so as to preserve the very existence of the nation. They involved wartime economic restrictions, temporary in character, and necessary to preserve the government, and the rights affected were considered "insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands." *United States v. Central Eureka Mining Co., supra*, at 168.

"It is the inherent and inalienable right of every man freely to deal or refuse to deal with his fellow men." *12 Am. Jur. Contracts*, Sec. 149, p. 641. "The power to regulate commerce, while great and paramount, cannot be exerted in violation of any fundamental right secured by other provisions of the National Constitution." *Adair v. United States*, 208 U.S. 161.

Article IV, Section 2, clause 1 of the original Constitution declares:

> "*Citizens privileges.* The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."

Construing the foregoing provision in *Slaughter-House Cases, supra*, at page 77 of 16 Wall, this Court said:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

We think that its purpose was also to declare to the individual citizen of every State that he could go into any State in the Union with the assurance that this provision of the Federal Constitution conferred upon him the right, while in the other State, to enjoy all Privileges and Immunities conferred by the laws of the other State upon its own citizens, but no others, except privileges and immunities of citizens of the United States arising out of the nature and essential character of the National government, and granted or secured by the Constitution of the United States.

This provision guarantees to every individual citizen that his civil rights, the rights of person and property, will not be subject to regulation by any authority other than that of the State in which he may sojourn, or become a citizen. This constitutional right of the citizen to have his civil rights, the rights of person and property, regulated by the States, was not changed by the Fourteenth Amendment. The entire domain of civil rights, the Privileges and Immunities of citizens of the States, prior to that amendment lay within the constitutional and legislative power of the States, and without that of the Federal government. They still remain exclusively with the States. *Slaughter-House Cases, supra; U.S. v. Cruikshank*, 92 U.S. 542; *United States v. Harris*, 106 U.S. 629; *Maxwell v. Dow*, 176 U.S. 581; *United States v. Wheeler*, 254 U.S. 281.

> "The government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States . . .

> Sovereignty; for the protection of the rights of life and personal liberty within the respective States, rests alone with the States. . . . The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, and from denying to any person within its jurisdiction the equal protection of the law; but it adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." *United States v. Cruikshank, supra*, headnotes 3, 7 and 8.

The Constitution does not confer upon Congress, either expressly or by implication, the power to legislate with respect to discrimination of one individual against another in his private business.

It seems rather absurb, to say the least, that Congress has been granted the power to establish a right in favor of a person to receive equal service at a private cafeteria, upon penalty to the owner of being forced out of business for failure to serve him when he did not wish to do so, while the power to protect such person and his property, and even his life, against the conduct of the owner, is the exclusive prerogative of the State.

Under the provisions of Article IV, Section 2, clause 1 of the Constitution a person may select any of the fifty States in which he may become a citizen, if he is a citizen of the United States. He can select any one of the fifty whose laws he deems suitable to afford him and his family the best opportunities for life, liberty, and the pursuit of happiness. If not satisfied with the laws of one State, and dispairing of being able to change them to conform to his desires, he may remove to another State without a visa. And he may, after trying another State, continue the process, if still dissatisfied, until he tries all fifty of the States. With such freedom of unrestricted movement, and the right to participate in making the laws in any State where he resides, it is grossly insulting, to say the least, for a citizen of any State to deplore the laws of another State.

> "The principle of 'Home Rule' was an axiom among the authors of the Constitution. After all, the vital test of self-government is not so much its satisfactoriness weighed in the scales of outsiders as it is its satisfactoriness weighed in the scales of 'the governed'."

Bute v. State of Illinois, 333 U.S. 640.

The right of the citizen under Article IV, Section 2, clause 1 to have his rights of person and property determined exclusively by the laws of the State to whose jurisdiction he submits his person, although a right not enumerated as such in the Constitution, is a right which was among those expressly reserved for him by the provisions of Article IX of the Amendments, which declares: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage

others retained by the people." There being no provision in the Constitution delegating the power to the United States to regulate the citizen's civil rights, the rights of person and of property, this power is reserved to the States, respectively, or to the people by Article X of the Amendments, which declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

The First Amendment right of "freedom to associate" clearly includes the correlative right of "freedom not to associate." In *NAACP v. Alabama*, 357 U.S. 449, 460, this Court said:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces Freedom of Speech."

This right is guaranteed to appellant by the First and Fifth Amendments against abridgment by the Congress.

Appellant has the right not to associate with persons whom he knows are irrevocably committed to the advocacy of beliefs and ideas which he abhors. He has the right to associate with persons whose beliefs and ideas he may feel to be most nearly compatible with his own, and whom he believes may be susceptible to being persuaded to accept his beliefs and ideas, without regard to the race, color, creed or national origin of such persons. And this right of freedom to associate or not to associate belongs to him in the conduct of his private business as well as in every other phase of his activities in the pursuit of happiness.

The Thirteenth Amendment prohibits involuntary servitude, except as punishment for crime. "Involuntary servitude has been correctly defined as 'the condition of one who is compelled by force, coercion or imprisonment and against his will to labor for another whether he is paid of not.' Black's Law Dictionary." *Crews v. Lindquist*, (1935) 361 Ill. 193, 197 N.E. 768, 772. "This amendment denounces a status or condition, irrespective of the manner or authority by which it is created." *Clyatt v. United States*, (1905) 197 U.S. 207, 216. "The plain intention was to abolish slavery of whatever name or form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting *that control* by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of *involuntary servitude*." (emphasis supplied). *Bailey v. Alabama*, 219 U.S. 219, 241. "No emergency can justify an exercise of legislative power to compel one man to render involuntary service to another." *Ex parte Milligan*, 4 Wall. 2, 18. ". . . the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even though he has contracted to render them." *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 199. "The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of members of the Negro race." *Corrigan v. Buckley*, 271 U.S. 323, 330. "While its immediate concern was African slavery, the Thirteenth Amendment was a charter of universal freedom for all persons of whatever race, color, or estate, under the flag. The words 'involuntary servitude' have a larger

meaning than slavery, and the Thirteenth Amendment prohibited *all control* by coercion of the personal service of one man for the benefit of another." (emphasis supplied). *Bailey v. Alabama*, supra.

The final judgment of civil contempt against appellant held him to be in violation of an injunction enjoining the Pickrick, Inc. and Lester G. Maddox from:

> (a) Refusing to admit Negroes to the premises of the Pickrick Restaurant upon the same basis and under the same conditions that non-Negro members of the general public are admitted to the restaurant;
>
> (b) Failing or refusing to sell food or meals and to provide service to Negro patrons upon the same basis and in the same manner that food, meals and services are made available to patrons of other races;
>
> (c) Otherwise failing or refusing to make any of the goods, services, facilities, privileges, advantages or accommodations of the Pickrick Restaurant available to Negroes upon the same basis and under the same conditions that they are made available to other races.

Appellant contends that he did not violate said injunction, because before he opened the Lester Maddox Cafeteria he posted in and about the Lester Maddox Cafeteria the following sign:

> "Notice. I do not offer to serve (1st) integrationists, nor (2) interstate travelers; regardless of race, color, creed or national origin. A person entering this restaurant for service will be considered as representing to me that such person is

neither an integrationist, nor an interstate traveler. If such representation is believed to be false, service will be refused. Lester Maddox, Owner, Lester Maddox Cafeteria."

At no time thereafter did appellant operate said cafeteria in such manner as to exclude therefrom, or fail or refuse to sell food or meals and to provide service, or otherwise fail or refuse to make any of the goods, services, facilities, privileges, advantages or accommodations of Lester Maddox Cafeteria available to Negroes upon any other basis or under any other conditions than they were made available to other races. He excluded from the cafeteria Negroes known to him to be integrationists upon the same basis and under the same conditions that he excluded members of the white race whom he knew to be integrationists. He refused to sell food and meals and to provide service, and failed and refused to make the goods, services, facilities, privileges, advantages and accommodations of Lester Maddox Cafeteria available to Negroes upon the same basis and under the same conditions that he refused these things to members of the white race.

The order is clearly one which directs appellant to render personal services against his will for the benefit of others, or suffer harsh penalties for refusing such service, and constitutes involuntary servitude in violation of the Thirteenth Amendment. Appellant can release himself therefrom, it is true, by rendering the service, but otherwise the services are enforced. *Clyatt v. United States*, *supra*, at 216.

We think the motions to affirm, in view of the foregoing authorities and argument, and the facts of this case, should be denied.

B.

ON MOTIONS TO DISMISS APPEAL

The appeal from the interlocutory injunction filed July 28, 1964, by the Pickrick Restaurant, a corporation, and Lester G. Maddox, its agent, was not prosecuted because the corporation closed its restaurant permanently on August 13, 1964. The injunction was made permanent on September 4, 1964, as to the operation of the Pickrick Restaurant. No appeal was taken from that final order relating to the Pickrick Restaurant.

On September 28, 1964, defendant Lester G. Maddox was the sole owner of Lester Maddox Cafeteria which he opened September 26, 1964, upon a part of the premises formerly used by the Pickrick Corporation, said real estate being the property owned by Maddox and under a long-term lease to the Corporation, which lease was terminated and cancelled by the parties on the latter date. Maddox, though previously conducting a restaurant business on these premises as President of Pickrick Corporation, did — after said injunction — conduct the same type of business on part of the same premises, but did so as an individual and not as an officer or agent of the corporation.

After hearing upon orders to show cause, Judge Hooper entered a final order on February 5, 1965, adjudging appellant in civil contempt for violating the injunction of September 4, 1964, in the subsequent operation of Lester Maddox Cafeteria. Appeal from this order to this Court was filed March 31, 1965.

The statutory provisions believed to confer on this Court jurisdiction of the appeal is Section 206 (b) of

Title II of the Civil Rights Act of 1964, 78 Stat. 245, 42 U.S.C. 2000a-5.

The only final judgment entered against appellant, as the owner of Lester Maddox Cafeteria, is the judgment appealed from in this case, and was entered after the hearing of the orders to show cause and appellant's responses thereto.

Appellant has been adjudged in civil contempt for violating a permanent injunction granted by a three-judge court, although the hearing was held and the order of contempt was entered by a single judge of that court.

In *Stratton v. St. Louis Southwestern*, 282 U.S. 10, at 16, the following language is used:

> "Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal thereunder to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court."

It was the evident intent of Congress that all challenges to the constitutionality of the application of the provisions of Title II of the Civil Rights Act of 1964 should be speedily determined by the Supreme Court. It provided for the empanelling of a three-judge court, if the Attorney General made a request that a court of three judges be convened to hear and determine the case, accompanied by his certificate that the case was of general public importance, and that an appeal from the final judgment of such court will lie to the Supreme Court. Only in the event the Attorney General should

fail to file such a request, was a designated district or circuit judge given jurisdiction to hear and determine the case.

In *Phillips v. United States*, 312 U.S. 246, 254, this language is used:

> "Had a timely appeal been taken to the circuit court of appeals the decree below could have been reviewed there, though rendered by three judges ... While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, enforce the limitations of Section 266 by an order framed to save appellants their proper remedies ... We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals."

In *Query v. United States*, 316 U.S. 486, 491 this language is used:

> "Since there was such complete satisfaction of the conditions which made Section 266 applicable, the cause was a proper one for a three-judge court and appeal did not lie to the Circuit Court of Appeals. But a direction by us to the Circuit Court of Appeals to dismiss the appeal which the petitioners brought to it would, without more, terminote the litigation. For the time within which a direct appeal to this Court might be brought under Section 266 has elapsed. In the present circumstances, however, we think the petitioners' right to such appeal should be preserved. Cf. *Phillips v. United States*, 312 U.S. 254, 61 S. Ct. 484, 85 LED.

800. The judgment below is therefore vacated and the cause remanded to the district court for the entry of a fresh decree from which a timely appeal may be taken if petitioners so desire."

Whatever method of appeal may be ultimately held applicable in a case of this kind, it being one of first impression, we respectfully urge that the Court frame an order in the cause so as to save to appellant his proper remedy.

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